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UNCLAS SECTION 01 OF 02 OTTAWA 000629

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SUBJECT: APPEALS COURT REAFFIRMS CANADA MUST SEEK KHADR'S
REPATRIATION FROM GUANTANAMO BAY

REF: OTTAWA 313

¶1. (SBU) Canada's appellate court on August 14 upheld a lower court ruling requiring the government to seek the repatriation of Guantanamo detainee and Canadian citizen Omar Khadr. According to the Prime Minister, the government will study the decision before deciding on next steps. An appeal to the Supreme Court remains a strong likelihood. End Summary.

¶2. (U) In a 2-1 decision, the Federal Court of Appeals of Canada upheld a lower court's ruling (reftel) that the actions of Canadian officials interviewing Canadian citizen Omar Khadr in captivity at Guantanamo Bay so violated his rights under the Canadian Charter of Rights and Freedom that the only effective remedy would be for the government to seek his repatriation. The justices admitted that the legal issues in this case were "narrow" and the "facts are highly unusual." However, they agreed that interviews in 2003 and 2004 at Guantanamo Bay by agents of the Canadian Security Intelligence Service and the Department of Foreign Affairs and International Trade -- knowing that U.S. military officials were using sleep deprivation techniques in their own interrogations -- indicated that they were "participating in a process that was illegal under the laws of the United States and contrary to Canada's international human rights obligation. For that reason, the Charter was engaged by their conduct," The Appeals Court also judged that "there is no factual basis for the Crown's argument that a court order requiring the Government to request the return of Mr. Khadr is a serious intrusion into the Crown's responsibility for the conduct of Canada's foreign affairs," especially since even the Crown had conceded in oral arguments that making such request would not damage Canada's relations with the U.S., nor "pose a threat to Canada's security." The Court highlighted that, contrary to the Crown's oral argument that there was "only a remote possibility that the United States would comply" with such a request, "the fact (is) that the United States has complied with requests from all other western countries for the return of their nationals from detention in the prison at Guantanamo Bay."

¶3. (U) In a lengthy dissent, Justice Nadon concluded that the lower court justice had "erred in determining that Canada had failed to protect Mr. Khadr" and "erred in regard to the appropriate remedy." He underscored that "Canada did not participate neither in "(Mr. Khadr's) arrest, transfer or detention." and that "the steps taken by Canada from 2002 to 2008 are sufficient to satisfy Canada's duty to protect Mr. Khadr." He commented that the lower court's decision requiring the government to seek repatriation constitutes a "direct interference into Canada's conduct of its foreign affairs," which should "be left to the judgment of those who have been entrusted by the democratic process to manage these matters on behalf of the Canadian people."

¶4. (U) In a press conference in Chelsea, Quebec on August 14, Prime Minister Stephen Harper noted the "split decision" of the appeals court and added that the Department of Justice was "examining" it and that the government would wait for DOJ's "analysis and recommendations." He declined to speculate whether the government would make an appeal to the Supreme Court of Canada. Separately, Liberal Party foreign QSupreme Court of Canada. Separately, Liberal Party foreign affairs critic Bob Rae told the media that "this is the time" for the government finally to seek to bring Mr. Khadr back to Canada.

¶5. (SBU) In a discussion with CDA on the eve of the decision, a senior official of the Prime Minister's Office predicted that the government would appeal to the Supreme Court if it lost at the appellate level. According to an official of the Privy Council Office on August 14, the government was still trying to "digest" the decision, but he took note our informal request for the government to consult privately with us before making public any possible request for repatriation.

¶6. (SBU) Comment: The vigorous dissent opinion should give the government some hope that an appeal to the Supreme Court could be successful, and could -- not incidentally -- also at least delay action until the next steps become clearer in the legal procedures against Mr. Khadr by the U.S. military authorities. Mr. Khadr's family remains deeply unpopular in Canada, although there is some sympathy for him since he was only 15 years old at the time of his capture. There would be virtually no political blowback domestically for the Conservative Party if the government chooses to pursue an

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appeal, making this a strong likelihood.

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